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Supreme Court, U.S.
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No. 051662

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In The

Supreme Court of the United States

ROYAL CARIBBEAN CRUISES, LTD.,

Petitioner,

vs.

JAMES MACK and SHEILA MACK,

Respondents.

On Petition For Writ Of *Certiorari*
To The Illinois Appellate Court, First District

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Under federal admiralty law, is a state court bound to apply established federal admiralty precedent precluding vicarious liability claims against cruise lines for the alleged negligence of shipboard doctors, or is it free to change admiralty law and permit such a vicarious liability claim against a cruise line?

2. Under federal admiralty law, does a passenger's signature on a ticket contract which contains a forum selection clause bind the passenger to the forum designated therein despite the passenger's subsequent claim that he did not timely receive or read the forum selection clause?

3. Under federal admiralty law, if an injured cruise line passenger is able to fly to a venue for vacation which is twice as far from his home as the forum selected, has that passenger satisfied the heavy burden of proof required to set aside the forum selection clause on grounds of inconvenience?

PARTIES TO THE PROCEEDING

Petitioner Royal Caribbean Cruises, Ltd. ("Royal Caribbean") was petitioner-appellant in the First District Appellate Court of Illinois and petitioner in the Illinois Supreme Court.

Respondents James Mack and Sheila Mack were respondents-appellees in the First District Appellate Court of Illinois and respondents in the Illinois Supreme Court.

Royal Caribbean has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

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BASIS FOR JURISDICTION

The Illinois Appellate Court, First District, entered its ruling on October 20, 2005. Appendix A-1. On November 28, 2005, the First District entered an order denying Royal Caribbean's petition for rehearing. Appendix A-39. On March 29, 2006, the Illinois Supreme Court denied Royal Caribbean's petition for leave to appeal. Appendix A-40. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.1 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) and Rule 13.1 of this Court to review on writ of *certiorari* the decision of an intermediate appellate State court following that State's highest court denying discretionary review thereof.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, article I, § 8, article III, § 2 and article VI, § 2.

STATEMENT OF THE CASE

Respondents James and Sheila Mack are husband and wife residing in Illinois who, together with their minor daughter Heather, took a vacation which included a Mediterranean cruise aboard petitioner Royal Caribbean's cruise ship M/V GRANDEUR OF THE SEAS. Appendix A-25. On June 28, 2001, Sheila Mack picked up Royal Caribbean's ticket booklet from her travel agent, who advised Mrs. Mack to read over the whole booklet, including the ticket contract. Appendix A-3.

The ticket booklet Mrs. Mack received provides, in blue ink:

> THIS IS YOUR CRUISE TICKET CONTRACT. IT IS IMPORTANT THAT YOU READ ALL TERMS OF THIS CONTRACT (PP 1-4). THIS TICKET IS NOT TRANSFERABLE AND IS NOT SUBJECT TO ALTERATION BY THE PASSENGER.
>
> Passenger Signature _____

On the next page, also in blue ink:

> CRUISE TICKET CONTRACT IMPORTANT— PASSENGER READ ALL CLAUSES (PAGE 1-4)
>
> Whether or not signed by passenger, this ticket shall be deemed to be an undertaking and acknowledgment by Passenger that he accepts on behalf of himself and all other persons traveling under this ticket, all the terms and conditions set out herein.

On the following page, in all capitals but in red ink:

> IT IS AGREED BY AND BETWEEN PASSENGER AND CARRIER THAT ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT SHALL BE LITIGATED, IF AT ALL, IN AND BEFORE A COURT LOCATED IN MIAMI, FLORIDA, U.S.A., TO THE EXCLUSION OF THE COURTS OF ANY OTHER STATE, TERRITORY OR COUNTRY. PASSENGER HEREBY WAIVES ANY VENUE OR OTHER OBJECTION THAT HE MAY HAVE TO ANY SUCH ACTION OR PROCEEDING BEING BROUGHT IN ANY COURT LOCATED IN MIAMI, FLORIDA.

Appendix A-3, A-32.

Sheila Mack took possession of the travel documents which included Royal Caribbean luggage tags. Appendix A-4. These tags are contained within Royal Caribbean ticket booklets, flowing the contractual terms and conditions.

When the Mack family arrived alongside the M/V GRANDEUR OF THE SEAS in Civitavecchia, Italy, they could not find their cruise ticket booklet and had to stand in a special line in order to board. Appendix A-4, A-29, A-30. As a precondition to being allowed to board, the Macks signed a "Cruise Ticket Contract," which states immediately above the passenger signature lines:

> THIS IS YOUR CRUISE TICKET CONTRACT. IT IS IMPORTANT THAT YOU READ ALL TERMS OF THIS CONTRACT (PP1-2). THIS TICKET IS NOT TRANSFERABLE AND IS NOT SUBJECT TO ALTERATIONS BY THE GUEST.

Appendix A-4, A-30, A-41.

Quoted beneath the perforation which is the bottom of the Cruise Ticket Contract is the same contract language that

appears in the Royal Caribbean ticket booklet, including the Miami forum selection clause. Appendix A-47.

In a complaint filed in the Circuit Court of Cook County, Illinois, James Mack claims that he sustained an injury aboard ship on August 3, 2001. Only two counts of the now-pending First Amended Complaint name Royal Caribbean. In Count I, James Mack alleges that Royal Caribbean was negligent by permitting "a sharp and dangerous object within and around its [shipboard] pool premises." In Count II, James Mack alleges that the treatment he received by the ship's doctor, G. Benediktsson, was below the standard of care and asserted that Royal Caribbean was vicariously liable for this medical malpractice. In all counts of this amended complaint, the Macks allege that their cruise line tickets were delivered to them in Cook County, Illinois.

On January 14, 2002 Royal Caribbean filed a motion to dismiss the entire complaint against it on the grounds that under federal admiralty law, the forum selection clause in the ticket contract required the litigation to be brought in Miami. On December 24, 2002, after the Macks amended their complaint, Royal Caribbean also moved to dismiss Count II for the vicarious liability of the ship's doctor on the grounds that a century of federal admiralty precedent precludes the cause of action. In addition, because on July 26, 2002 James and Sheila Mack filed in Miami, Florida, Case No. 02-18958 CA 06 (11th Jud. Cir. Miami-Dade County, Florida), a new complaint against Royal Caribbean and the ship's doctor, G. Benediktsson, M.D., for the same occurrences which are the subject of the complaint *sub judice*, Royal Caribbean also sought dismissal of the Illinois proceedings on the grounds that there was another action pending between the same parties for the same cause of action.

On April 30, 2003 the trial court dismissed the vicarious liability claim (Count II) with prejudice. With respect to the forum selection clause, the court allowed extensive briefing

and conducted an evidentiary hearing. While the forum selection clause issue was pending, the Macks filed a motion for reconsideration of dismissal of the vicarious liability claim.

On June 2, 2004 the trial court granted the Macks' motion for reconsideration and reinstated the vicarious liability claim, after acknowledging to the parties in chambers that there was a substantial difference of opinion on the subject. On July 12, 2004 the trial court entered findings of fact and conclusions of law with respect to the choice of forum issue, denying Royal Caribbean's motion and allowing the case to proceed in Illinois. Appendix A-24. The trial court found that plaintiffs had not received Royal Caribbean's tickets in Cook County, Illinois. The trial court further found that Royal Caribbean had not given the Macks the forum selection clause.

Since the accident, Mr. Mack suffers partial paralysis and attended court in a wheelchair. Appendix A-24. Following the incident, Mr. Mack has flown to New York, Denver and to Cancún, Mexico for an eight-day vacation. Appendix A-5, A-32. New York and Denver are close to the same distance from Chicago as Chicago is to Miami. Cancún is much farther from Chicago than is Miami. The trial court found that enforcing the forum selection clause "would hinder [the Macks] from having their day in Court because it would require them to travel to Florida" and that trial in Florida would be "extremely difficult, if not impossible." Appendix A-36.

Contrary to *De Zon v. American President Lines, Ltd.*, 318 U.S. 660 (1943), the Illinois Appellate Court ruled on October 20, 2005 that a passenger could claim vicarious liability against the shipowner for the alleged negligence of the ship's doctor. Appendix A-20. The appellate court also affirmed the trial court's decision not to enforce the forum selection clause. Appendix A-10. Royal Caribbean timely

filed a petition for rehearing on November 10, 2005, which the Illinois Appellate Court denied on November 28, 2005. Appendix A-39. On March 29, 2006, the Illinois Supreme Court denied Royal Caribbean's petition for leave to appeal. Appendix A-40.

Royal Caribbean asks that this Court grant its petition for a writ of *certiorari* to conform the lower courts' rulings to Supreme Court and federal admiralty precedent.

ARGUMENT

A. The Illinois Appellate Court Decision Regarding Vicarious Liability Conflicts with Supreme Court and United States Court of Appeals Precedent.

1. Importance of Supreme Court Review.

This Court should grant *certiorari* pursuant to Supreme Court Rule 10(c) because by permitting a vicarious liability claim against a shipowner for the alleged negligence of the ship's doctor to stand, the courts below have issued rulings which conflict with a controlling decision of the United States Supreme Court and a century's worth of decisions of federal circuit courts of appeal. The appellate court erred by ignoring the cited U.S. Supreme Court precedent, for this Court has special constitutional powers of pronouncement when it comes to determining the admiralty law of the United States. Further, both courts below erred by following decisions of federal *district* courts or of state courts when a contrary rule previously had been pronounced by superior federal courts. This Court should grant the petition for writ of *certiorari* and conform the rulings below to the precedent pronounced by the tribunals constitutionally empowered to determine federal admiralty law.

In addition, the Florida appellate decision which purported to announce a new rule permitting vicarious liability claims (*Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. App. 2003), *appeal allowed,* 904 So. 2d 430 (Fla.

2005)) itself recognized the public importance of the issue by certifying "public importance" and commending review by the Florida Supreme Court, which agreed and accepted discretionary review. The issue is no less important in Illinois waters or for an Illinois litigant. Inasmuch as the ecumenical purpose of the Constitution's grant of admiralty jurisdiction to the federal courts is to provide a uniform body of law that applies equally to a ship in the Straits of Mackinaw as it does to one in the Straits of Florida, having one rule partially effective in Florida and now, apparently, also for navigable waters within Cook County, Illinois, and having a different rule in forty-eight other states and the increasing number of Florida districts which do not agree with *Carlisle* is untenable and illustrates the flaw in *Carlisle* and all cases pulled into its wake. This Court should grant Royal Caribbean's petition for writ of *certiorari* and overturn the lower courts' anomaly in favor of what uniformly had been admiralty law for more than a century. "It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed." *The LOTTAWANNA*, 21 Wall. (88 U.S.) 558, 575 (1875).

2. Federal Admiralty Law Precludes the Vicarious Liability Claim.

In Count II of their first amended complaint, the Macks seek to hold Royal Caribbean vicariously liable for the alleged medical malpractice of Dr. G. Benediktsson, who is not a party to the Illinois proceeding (but who is named in respondents' Florida suit). Royal Caribbean moved to dismiss this count on the grounds that more than one hundred years of admiralty precedent precluded the cause of action. *See, e.g., Barbetta v. S/S BERMUDA STAR*, 848 F.2d 1364, 1369 (5th Cir. 1988) (an "impressive number of courts

from many jurisdictions have, for almost 100 years, followed the same basic rule . . . If the doctor is negligent in treating a passenger, however, that negligence will not be imputed to the carrier").

This has been the rule in admiralty since the Passenger Act of 1882. *See generally De Zon,* 318 U.S. at 666 n.2 ("[l]iability to a passenger injured by the negligence of a ship's doctor has been denied on this ground") (citations omitted). That remains the law in every federal circuit to consider the question: *Cummiskey v. Chandris, S.A.,* 895 F.2d 107, 108 (2d Cir. 1990) ("appellees could not be held vicariously liable for the alleged malpractice of [the ship's doctor] because the duty of a ship's owner or operator to passengers is limited to the exercise of reasonable care in selecting a competent and duly qualified physician"); *Barbetta,* 848 F.2d at 1369 (quoted above); *The GREAT NORTHERN,* 251 Fed. 826, 832 (9th Cir. 1918) ("the responsible person is the physician, and errors and mistakes occurring in the use of medicines are not chargeable to the shipowner"); *Nanz v. Costa Cruises,* 1991 A.M.C. 48, 49 (S.D. Fla. 1990) ("[i]t is a well established principle of maritime law that a shipowner/operator . . . cannot be held liable for the negligence of its ship doctor"), *aff'd without opinion,* 932 F.2d 977 (11th Cir. 1991).

The Macks contended in the trial court that there is a "new trend" in the law set forth in *Carlisle,* but that case is an errant, isolated and non-final state court decision that goes against decisions to the contrary by scores of superior courts. As a preliminary matter, however, it should be noted that in an admiralty case, the decisions of article III courts—whence the jurisdiction arises—trump any decision of a state court.

The trial court was constitutionally obligated to look to the pronouncements of the United States Congress, the United States Supreme Court and the federal circuit courts of appeal for the rule of decision in an admiralty case. "After

reference to article I, § 8 and article III, § 2 of the Constitution, . . . it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. . . . And further, that in the absence of some controlling statute, *the general maritime law, as accepted by the federal courts,* constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction." *Chelentis v. Luckenbach Steamship Co.,* 247 U.S. 372, 381 (1918) (emphasis added).

The decisions of inferior federal district courts have no precedential effect, as the federal district courts and state courts must abide U.S. Supreme Court and federal circuit court of appeal precedent in deciding matters under federal admiralty law. It was plain error for the trial and appellate courts to rely on three inferior federal district court opinions because, in addition to being outnumbered by the federal district courts which adhere to the established law, under federal jurisprudence, "[d]istrict court decisions have no weight as precedent, no authority." *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995).

Although the Illinois Appellate Court opinion ignored this Court's statement in *De Zon,* 318 U.S. at 666 n.2, that under admiralty law, passengers have not been entitled to sue cruise lines for the alleged negligence of a ship's doctor, that court's action overlooks an important point about the U.S. Supreme Court's special role in determining federal admiralty law. As this Court said about its own authority to fashion rules governing admiralty:

> in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. *See, e.g., Garrett v. Moore-McCormack Co.*, 317 U.S. 239 [1942].

Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310, 314 (1955). Unfortunately, that is what the appellate court opinion did by completely ignoring *DeZon*, and what the concurring opinion did by dismissing this Court's statement of what federal admiralty law has been prior to the *De Zon* case as mere *dictum*. Appendix A-22. To the contrary, U.S. Supreme Court pronouncements of admiralty law have the force of law under article III of our constitution. *See also Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959) (article III "empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction,' and to continue the development of this law within constitutional limits") (citation omitted). Indeed, even in instances where a federal circuit court of appeals believes an established maritime rule is antiquated or lacks continuing merit, it has no constitutional authority to change it. *Oriental Trading & Transport Company, Inc. v. Gulf Oil Corp.*, 173 F.2d 108, 111 (2d Cir. 1949) (after the Supreme Court has spoken, and no matter how antiquated the rule a circuit appellate court has "no power to divest ourselves of this vestigial right") (*cited with approval in U.S. v. Reliable Transfer Co.*, 421 U.S. 397, 403 (1975)). Certainly, if a federal appellate court cannot change a longstanding and judicially established rule of admiralty, other courts bound by the Supremacy Clause of the United States Constitution, article VI, § 2, cannot do so either. The federal cases which the lower courts were

constitutionally obligated to abide uniformly preclude plaintiffs' vicarious liability claim for the alleged negligence of the ship's doctor. Based on the controlling federal admiralty authorities, the vicarious liability claim against Royal Caribbean for the alleged negligence of one of its ship's doctors was properly – and should again be – dismissed.

The rule of decision remains the same even when the matter properly is pending in a state court. State courts are given concurrent jurisdiction to hear *in personam* admiralty cases under the Judiciary Act of 1789, and continue to exercise concurrent jurisdiction, now federally codified as 28 U.S.C. § 1333(1). Consistently throughout the exercise of centuries of this concurrent jurisdiction, the rule of decision state courts apply is federal admiralty law:

> Stated another way, the "saving to suitors" clause [28 U.S.C. § 1333(1)] allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-*Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222-23 (1986) (citations omitted). *See also Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243 (1942) (there "is no dearth of example of the obligation on [state] law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice"); *see generally* 1 BENEDICT ON ADMIRALTY, §§ 121-24 (2002).

As for *Carlisle* itself, it is an isolated opinion that goes against a century's worth of decided case law, including decisions from federal district courts in Florida and the Eleventh Circuit which the Florida appellate court had been

bound to follow. *Mascolo v. Costa Crociere,* 726 F. Supp. 1285, 1286 (S.D. Fla. 1989); *Doe v. Celebrity Cruises,* 145 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 2001); *Stires v. Carnival Corp.,* 243 F. Supp. 2d 1313, 1318 (M.D. Fla. 2002). Further, it is clearly distinguishable because *Carlisle* was based in part on the Limitation of Vessel Owner's Liability Act, 46 App. U.S.C.A. § 183c, which precludes vessel owners from limiting their liability to passengers for personal injury. However, that statute has no application to a wholly-foreign voyage, such as the Mediterranean passage *sub judice. See, e.g., Hodes v. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 914-15 (3d Cir. 1988) ("the provisions of § 183c . . . are limited in their application to voyages that touch the United States"); *Mills v. Renaissance Cruises, Inc.*, 1993 A.M.C. 131, 134-35 (N.D. Cal. 1992) ("§ 183c applies only to voyages that touch the United States"). Thus, the premise of the *Carlisle* court's rationale – unlawfulness of the liability disclaimer under 46 App. U.S.C.A. § 183c – is not applicable to our Mediterranean case.

Even if *Carlisle* were precedential, its premise is off base due to the nature of the relationship between the passenger and the physician, and the vessel's lack of control over that professional and the physician-patient relationship. As the *Barbetta* court explained:

> [A] shipping company is not in the business of providing medical services to passengers; it does not possess the expertise requisite to supervise a physician or a surgeon carried on board a ship as a convenience to passengers. A ship is not a floating hospital; a ship's physician is an independent medical expert engaged on the basis of its professional qualifications and carried on board a ship for the convenience of passengers, who are free to contract with him for any medical services they

may require.

Barbetta, 848 F.2d at 1369-70 (citation omitted).

It was error for the trial court to grant the Macks' motion to reconsider dismissal of and reinstate Count II based on the *Carlisle* decision, and error for the Illinois Appellate Court to affirm that result.

B. The Forum Selection Clause Is Valid and Should Be Upheld.

1. Importance of Supreme Court Review.

There were two determinations below with respect to the forum selection clause issue which contradict this Court's holding in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), thus warranting this Court granting *certiorari* under Supreme Court Rule 10(c). *First,* since respondents allege that they received the ticket containing the forum selection clause in question in Cook County, they should not have been allowed thereafter to argue the contrary, especially after admitting the authenticity of their signatures on a form signed shipside that iterated the exact language of the forum selection clause they previously alleged as having had received. *Second,* if Mr. Mack could fly from Chicago to Cancún for an eight-day vacation, it is not impossible for him to fly about half as far to Miami for trial.

2. Plaintiffs Received Their Tickets in Cook County, Illinois.

Plaintiffs allege in several counts of their First Amended Complaint that they indeed received Royal Caribbean's tickets in Cook County, Illinois. These allegations were included in the amendment only after Royal Caribbean filed its motion to dismiss the original complaint based on improper venue so, clearly, adding venue-specific allegations about receiving tickets "in Cook County" was a contemplated change by plaintiffs designed to establish

venue in Cook County over the Miami-based cruise line, not an inadvertent one. It is nothing short of gamesmanship for plaintiffs to allege this fact for purposes of establishing venue against the Miami-based cruise line in Illinois, but then seek to evade their own allegation once the fact is used for purposes of enforcing the forum selection clause contained in the ticket.

Furthermore, James Mack admitted to handling the luggage tags at home before the family left, and those tags were attached within the ticket booklet that contains the forum selection clause. Significantly, there is no dispute that Mr. Mack signed a form alongside the ship which iterated the forum selection language. Mr. Mack should not now be permitted to say that he did not know what the form contained. *Upton v. Tribilcock*, 91 U.S. 45 (1875) ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained"); *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) (one has a duty to learn or know the contents of a written contract before signing it).

Any one of these factors alone ought to have led to the conclusion that Mr. Mack received notice of the forum selection clause. Moreover, in light of the 2½ years it took for the trial court to reach a decision on the forum selection issue, this Court's language in the seminal case is particularly apposite:

> [A] cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on the cruise would subject the cruise line to litigation in several fora. . . . Additionally, **a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling**

> **any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding these motions.** . . . Finally, it stands to reason that passengers who purchase tickets containing a forum selection clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.

Shute, 499 U.S. at 593-94 (emphasis added).

3. If Plaintiff Can Fly to Cancún for an Eight-Day Vacation, He Surely Is Able to Fly to Miami for Trial.

While trial in Miami may not be as convenient for Mr. Mack as trial in Chicago would be, trial in Miami is not so difficult that it would deprive him of an opportunity to be heard, especially in light of Mr. Mack's admitted post-incident travel to Cancún for an eight-day vacation. The lower court decisions excusing Mr. Mack from abiding the forum selection clause do not satisfy the "heavy burden of proof" required to set aside the forum selection clause on grounds of inconvenience. *Shute*, 499 U.S. at 595.

C. Conclusion.

Based on the foregoing, Royal Caribbean respectfully requests that this Court grant this petition. Review of the Illinois Appellate Court decision through a writ of *certiorari* will yield a result that conforms to Supreme Court precedent and promotes the orderly pronouncement of admiralty law by the tribunals constitutionally empowered to change it.

Respectfully submitted,

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June 2006

838 N.E.2d 80

Appellate Court of Illinois, First District,
Fourth Division.
James MACK and Sheila Mack,
Plaintiffs and Respondents-Appellees,
v.
ROYAL CARIBBEAN CRUISES, LTD.,
Defendant and Petitioner-Appellant.
No. 1-04-2168.

Oct. 20, 2005.
Rehearing Denied Nov. 28, 2005.

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Paul B. Episcope, LLC, Chicago (Michael T. Mullen, Anthony J. Masciopinto), for Appellee.

Justice GREIMAN delivered the opinion of the court:

Plaintiffs James and Sheila Mack brought suit against defendant Royal Caribbean Cruise Lines, Ltd., alleging that James cut his foot in the swimming pool area of a cruise ship owned and operated by defendant. Plaintiffs alleged that defendant was liable for negligently maintaining its swimming pool area; that defendant was vicariously liable for the negligent medical treatment James received from defendant's on-board physician; and that defendant was liable to Sheila for loss of consortium. Pursuant to Supreme Court Rule 308 (155 Ill.2d R. 308), defendant now appeals the trial court's interlocutory orders reinstating the plaintiffs' vicarious liability count and denying defendant's motion to dismiss.

Plaintiffs filed suit on November 29, 2001. Defendant moved to dismiss the vicarious liability and loss of consortium counts of plaintiff's complaint on the grounds that federal admiralty law did not recognize those causes of action. Initially, the trial court granted defendant's motion; however, on June 2, 2004, the trial court granted plaintiff's motion to reinstate the vicarious liability count after considering the recent holding of the Florida appellate court in *Carlisle v. Carnival Corp.*, 864 So.2d 1 (Fla.App.2003), *appeal allowed,* 904 So.2d 430 (Fla.2005). *Carlisle* held that a passenger injured by the negligent treatment of a cruise line's on-board physician could maintain a vicarious liability cause of action against the cruise line.

Defendant also moved to dismiss the case on the grounds that the forum selection clause in the ticket contract between the parties required plaintiffs to bring suit in Miami, Florida. The case proceeded to an evidentiary hearing on this issue.

Nancy Calvo Varela testified that on March 2001, plaintiffs met with her to discuss Mediterranean cruises. Varela, a travel agent for American Express Travel, doing business as Crossroads Travel Service (hereinafter Crossroads Travel), provided plaintiffs with several brochures. Varela testified that on March 14, 2001, Sheila visited Crossroads Travel to place a deposit on a cruise offered by defendant. On June 8, 2001, Sheila visited Crossroads Travel to make final payment on the cruise. On June 28, 2001, Sheila visited Crossroads Travel a final time to pick up her trip information. Varela identified a ticket booklet at the hearing. While not identical, the booklet was essentially the same as the one Varela testified that she had given Sheila. It provided in relevant part:

"IT IS AGREED BY AND BETWEEN PASSENGER AND CARRIER THAT ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT SHALL BE LITIGATED, IF AT ALL, IN AND BEFORE A COURT LOCATED IN MIAMI, FLORIDA, U.S.A., TO THE EXCLUSION OF THE COURTS OF ANY OTHER STATE, TERRITORY, OR COUNTRY. PASSENGER HEREBY WAIVES ANY VENUE OR OTHER OBJECTION THAT HE MAY HAVE TO ANY SUCH ACTION OR PROCEEDING BEING BROUGHT IN ANY COURT LOCATED IN MIAMI, FLORIDA."

Varela testified that on June 28, 2001, when she gave Sheila the ticket booklet, she explained that Sheila should read the booklet and that it would need to be signed before the plaintiffs could board the ship. Varela did not discuss the substance of the booklet or specifically refer Sheila to the forum selection clause. Varela testified that the booklet would have contained both ground transportation vouchers that would have allowed plaintiffs to board the bus from the airport in Rome to the pier in Civitavecchia, Italy, and tickets that would allow them to board the ship once they arrived at the pier. Varela testified that if a cruise passenger arrived at the dock without a ticket, he would be required to sign a ticket dockside before boarding the ship.

Sheila testified that she, James and their daughter met with Varela in early March 2001 to discuss booking a cruise. On March 14, 2001, Sheila placed a deposit on the trip and Varela gave her an itinerary, a confirmation slip from Fun Jet airline and confirmation vouchers for plaintiffs' transportation from the airport to the ship. On June 8, 2001, James made the final payment on the trip. On

June 28, 2001, Sheila received a folder from Varela that included plaintiffs' airline tickets and luggage tags. Sheila testified that she did not receive a ticket booklet. James testified that his wife was responsible for making all of the arrangements for the trip. He also did not receive a ticket booklet at any time.

Plaintiffs testified that upon their arrival in Rome, they were directed to a bus that would transport them to the cruise ship in Civitavecchia, Italy. Defendant's staff asked plaintiffs to present their ground transportation tickets, which they did not have. Nonetheless, plaintiffs were permitted to board the bus because their names appeared on the passenger list. Plaintiffs testified that when they arrived at the pier, defendant's representatives requested that plaintiffs present their tickets to board the ship, which plaintiffs also did not have. Plaintiffs were directed to wait in the "problem" line. Plaintiffs were each asked to sign a small perforated sheet that provided:

"THIS IS YOUR CRUISE TICKET CONTRACT. IT IS IMPORTANT THAT YOU READ ALL TERMS OF THIS CONTRACT (PP1-2). THIS TICKET IS NOT TRANSFERABLE AND IS NOT SUBJECT TO ALTERATIONS BY THE GUEST."

Plaintiffs testified that nothing was attached to the small sheet.

Plaintiffs signed the perforated sheet after being informed that no family member could board the ship without signing the document. Sheila assumed the document was to open an on-board charge account. James admitted that he did not scrutinize the perforated sheet. When the plaintiffs signed the perforated sheet, both were

distracted by their young daughter and had had little rest since leaving for their trip.

Concerning the hardship that plaintiffs would endure if forced to litigate their case in Florida, Sheila testified that James is partially paralyzed and that he is unable to use the bathroom and must use a urine bottle when traveling. James testified that he must switch to a smaller wheelchair when he boards airplanes and must carefully monitor what he eats and drinks. James testified that both his wife and daughter would accompany him to Miami, Florida, to litigate the suit because he requires Sheila's help in traveling and his second-grade daughter would have nobody to take care of her in Chicago. Nonetheless, plaintiffs admitted that since his injury, James had taken trips to New York, Denver and Cancun.

On July 12, 2004, the trial court made several factual and legal findings. The trial court found that plaintiffs never received a complete ticket contract containing the forum selection clause, and the only portion of a ticket contract ever provided by defendants to plaintiffs was the perforated sheet to which nothing was attached. Furthermore, the trial court found that at no time was the forum selection clause otherwise communicated to plaintiffs by defendant or Crossroads Travel. Accordingly, plaintiffs never accepted the terms of the clause. The court further found that litigating the suit in Miami, Florida, would be "extremely difficult, if not impossible" for James, given his physical handicap and financial hardships. Accordingly, the trial court denied defendant's motion to dismiss.

The trial court certified the following two questions to this court:

> "1. Under federal admiralty law, is a state court bound to apply federal admiralty precedent precluding vicarious liability claims against cruise lines for the alleged negligence of shipboard doctors, or is it free to permit such a vicarious liability claim against a cruise line?
>
> 2. Under federal admiralty law, does a passenger's signature on a ticket contract which contains a forum selection clause bind the passenger to the forum designated therein despite the passenger's claim that he did not timely receive or read the forum selection clause?"

On October 20, 2004, pursuant to Rule 308, we granted defendant's application to appeal. After the parties had fully briefed their arguments, on March 31, 2005, defendant moved to strike plaintiffs' argument that the forum selection clause should not be enforced because enforcement would cause them undue physical and financial hardship. According to the motion, on October 22, 2004, defendant served plaintiffs with interrogatories inquiring about any trips James had taken since his original deposition. Plaintiffs had failed to respond to the interrogatories. On April 11, 2005, we allowed the motion and took it with the case.

We will first address the outstanding motion. In reviewing the trial court's order denying defendant's motion to dismiss, this court is confined to consider evidence and matters considered by the trial court in issuing its order. *Wieser v. Missouri Pacific R.R. Co.*, 98 Ill.2d 359, 363-64, 74 Ill.Dec. 596, 456 N.E.2d 98 (1983); *Logan v. Old Enterprise Farms, Ltd.*, 139 Ill.2d 229, 237, 151 Ill.Dec. 323, 564 N.E.2d 778 (1990). The trial court's July 12, 2004, determination that the case should not be dismissed was

based on the evidence presented during the evidentiary hearing. Defendant's interrogatories were served after this court had granted defendant's application for appeal. Because we review only the matters considered by the trial court, plaintiffs' failure to respond to the interrogatories at issue has no bearing on our analysis. Accordingly, we deny defendant's motion to strike plaintiffs' argument regarding the physical and financial hardship they would experience as a result of enforcement of the forum selection clause.

We turn now to the trial court's second certified question regarding the enforceability of the forum selection clause. Defendant contends that the trial court erred in refusing to dismiss this suit based upon the forum selection clause in the ticket contract because the evidence adduced at the hearing supports the conclusion that the forum selection clause was reasonably communicated to plaintiffs. Plaintiffs respond that the evidence indicated that the clause was not reasonably communicated and that the evidence further indicated they would suffer physical and financial hardship if the clause were enforced.

A cruise ticket is a maritime contract governed by federal admiralty law. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 590, 111 S.Ct. 1522, 1525, 113 L.Ed.2d 622, 629 (1991). Forum selection clauses are "'prima facie valid.'" *Shute,* 499 U.S. at 589, 111 S.Ct. at 1525, 113 L.Ed.2d at 629, quoting *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 9-10, 92 S.Ct. 1907, 1913, 32 L.Ed.2d 513, 520 (1972). Nonetheless they are subject to "judicial scrutiny for fundamental fairness." *Shute,* 499 U.S. at 595, 111 S.Ct. at 1528, 113 L.Ed.2d at 633. Federal courts have employed a two-pronged "reasonable communicativeness"

test to determine whether a contract clause was reasonably communicated to a passenger and was, therefore, contractually binding. *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 835 (9th Cir.2002); *Ward v. Cross Sound Ferry*, 273 F.3d 520, 523 (2nd Cir.2001). Unless both prongs of the test are met, the contract clause will not be enforced. See *Wallis*, 306 F.3d at 835-37; *Ward*, 273 F.3d at 523. The first prong of the test examines the appearance of the ticket, including "'"size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question."'" *Wallis*, 306 F.3d at 835-36, quoting *Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1364 (9th Cir.1987), quoting *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 864 (1st Cir.1983). The second prong of the test focuses on external circumstances, such as the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice the passenger received outside of the ticket. *Ward*, 273 F.3d at 525. In order to determine whether a clause was reasonably communicated, a court applies "'"an analysis of the overall circumstances on a case-by-case basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake."'" *Wallis*, 306 F.3d at 835, quoting *Deiro*, 816 F.2d at 1364, quoting *Shankles*, 722 F.2d at 866. Courts may also consider physical or financial impediments suffered by plaintiffs when deciding whether to enforce a forum selection clause. *Walker v. Carnival Cruise Lines*, 107 F.Supp.2d 1135, 1140-41 (N.D.Cal.2000). Because the trial court's determination that the forum selection clause would not be enforced depended on its factual findings, we will not reverse unless those findings were contrary to the

manifest weight of the evidence. *Hernandez v. New Rogers Pontiac, Inc.*, 332 Ill.App.3d 461, 464, 265 Ill.Dec. 715, 773 N.E.2d 77 (2002).

At the evidentiary hearing, Varela testified that she gave plaintiffs the ticket booklet containing the forum selection clause before embarking on their trip. Varela further testified that the booklet would have contained plaintiffs' bus and cruise tickets. Plaintiffs testified that they were not given the booklet. Plaintiffs' testimony was supported by the uncontested fact that, upon arrival in Italy, plaintiffs were unable to provide defendant's representatives with either the bus or cruise tickets. Plaintiffs further testified that the perforated sheet they signed dockside was not attached to a larger document containing the forum selection clause. While defendant now argues that a document containing the clause would have been attached to the perforated sheet, it offered no direct testimony to that effect during the hearing. Plaintiffs' testimony further indicated that, though James had taken several trips since the cruise, traveling to Miami, Florida, to litigate the case would be difficult because of James' disability and because Sheila and plaintiffs' daughter would be forced to accompany him. The court found that plaintiffs were never given any document containing the forum selection clause or otherwise informed of the content and restrictions imposed by the clause. Consequently, plaintiffs had not accepted the terms of the clause. The court further found that forcing plaintiffs to litigate in Miami, Florida, would cause undue hardship. Given the evidence presented during the hearing in support of the trial court's conclusion and the scant evidence presented to dispute it, we cannot say that the trial court's conclusion

that the forum restriction was not reasonably communicated to plaintiff was contrary to the manifest weight of the evidence.[1]

We turn now to the trial court's inquiry as to whether federal law requires dismissal of plaintiffs' vicarious liability count. Defendant argues that, in reinstating the vicarious liability claim, the trial court ignored a largely established rule of law which precludes vicarious liability counts against carriers for the alleged negligence of shipboard doctors. Plaintiffs respond that the trial court was correct to follow the more reasoned approach of modern cases, which allows vicarious liability claims against carriers.

Torts committed within the boundaries of maritime jurisdiction are subject to maritime law. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 628, 79 S.Ct. 406, 408-09, 3 L.Ed.2d 550, 553 (1959). Generally, under maritime law, a carrier owes a duty to its passengers to exercise reasonable care under the circumstances. See *Kermarec,* 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550. Section 1333(1) of the Judiciary and Judicial Procedure Act provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the State, of: (1) Any

[1] Notably, even if the trial court had found that a document containing the forum selection clause were attached to the perforated sheet signed by plaintiffs dockside, *Ward* suggests that a finding that the clause was not reasonably communicated would nonetheless be proper. In *Ward,* the plaintiff received the ticket containing language limiting the time in which she could bring a cause of action moments before boarding the boat. The *Ward* court held that "possession of the ticket for such a short period of time was insufficient" to notify the plaintiff of the limitation language contained therein. *Ward,* 273 F.3d at 525.

civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (2000). Section 1333(1), known as the "saving to suitors" clause, "leaves state courts competent to adjudicate maritime causes of action in proceedings *in personam* and means that 'a state, "having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit" so long as it does not attempt to [give *in rem* remedies or] make changes in the "substantive maritime law."' [Citations.] Stated another way, the 'saving to suitors' clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 222-23, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174, 189-90 (1986), quoting *Madruga v. Superior Court,* 346 U.S. 556, 560-61, 74 S.Ct. 298, 300-301, 98 L.Ed. 290, 296 (1954), quoting *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 124, 44 S.Ct. 274, 277, 68 L.Ed. 582, 587 (1924).

Alton & Southern Ry. Co. v. Alton Transportation Co., 79 Ill.App.3d 591, 593, 35 Ill.Dec. 339, 399 N.E.2d 173 (1979); *In re Chicago Flood Litigation,* 308 Ill.App.3d 314, 330-31, 241 Ill.Dec. 714, 719 N.E.2d 1117 (1999).

We note that federal courts follow two approaches to a passenger's claim of medical negligence against a carrier. The traditional maritime rule provides:

> "When a carrier undertakes to employ a doctor aboard ship for its passengers' convenience, the

> carrier has a duty to employ a doctor who is competent and duly qualified. If the carrier breaches its duty, it is responsible for its own negligence. If the doctor is negligent in treating a passenger, however, that negligence will not be imputed to the carrier." *Barbetta v. S/S Bermuda Star,* 848 F.2d 1364, 1369 (5th Cir.1988).

The *Korea Maru,* 254 F. 397, 399 (9th Cir.1918); *The Great Northern,* 251 F. 826, 830-32 (9th Cir.1918); *Di Bonaventure v. Home Lines, Inc.,* 536 F.Supp. 100, 103-104 (E.D.Penn.1982); *Cimini v. Italia Crociere Int'l S.P.A.,* 1981 A.M.C. 2674, 2677 (S.D.N.Y.1981); *Amdur v. Zim Israel Navigation Co.,* 310 F.Supp. 1033, 1042 (S.D.N.Y.1969); *Branch v. Compagnie Generale Transatlantique,* 11 F.Supp. 832 (S.D.N.Y.1935); *Churchill v. United Fruit Co.,* 294 F. 400, 402 (D.Mass.1923); *The Napolitan Prince,* 134 F. 159, 160 (E.D.N.Y.1904); *O'Brien v. Cunard Steamship Co.,* 154 Mass. 272, 28 N.E. 266, 267 (1891); *Laubheim v. De Koninglyke Neder Landsche Stoomboot Maatschappy,* 107 N.Y. 228, 13 N.E. 781 (1887).

The *Barbetta* court articulated the "two justifications" for the age-old rule:

> "The first justification emphasizes the nature of the relationship between the passenger and the physician, and the carrier's lack of control over that relationship. * * *
>
> 'The work which the physician or surgeon does . . . is under the control of the passengers themselves. It is their business, not the business of the carrier . . . . The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant engaged in their business, and subject to their control as to his mode of treatment.'

> [Citations.] * * * [T]he courts have also recognized a second restrictive force. * * *
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> '[A] shipping company is not in the business of providing medical services to passengers; it does not possess the expertise requisite to supervise a physician or surgeon carried on board a ship as a convenience to passengers. A ship is not a floating hospital; a ship's physician is an independent medical expert engaged on the basis of his professional qualifications and carried on board a ship for the convenience of passengers, who are free to contract with him for any medical services they may require.'" *Barbetta,* 848 F.2d at 1369-70, quoting *O'Brien,* 154 Mass. at 276, 28 N.E. at 267 and *Amdur,* 310 F.Supp. at 1042.

As the *Barbetta* court pointed out, both justifications for the rule concern the control the shipowner exercises over its on-board doctor.

Nonetheless, in recent years, federal and state courts have declined to follow the traditional rule that a carrier will not be held liable for negligent treatment rendered by its on-board doctor. A federal district court first called the rule into question in 1959 in *Nietes v. American President Lines, Ltd.,* 188 F.Supp. 219, 221 (N.D.Cal.1959). In *Nietes,* the court refused the defendant shipowner's request to follow what it considered an outdated and "ancient rule" and dismiss a wrongful death suit brought against the defendant pursuant to the doctrine of *respondeat superior. Nietes,* 188 F.Supp. at 220. The *Nietes* court held:

> "[W]here a ship's physician is in the regular employment of a ship, as a salaried member of the crew, subject to the ship's discipline and the master's orders, and presumably also under the

> general direction and supervision of the company's chief surgeon through modern means of communication, he is, for the purposes of *respondeat superior* at least, in the nature of an employee or servant for whose negligent treatment of a passenger a shipowner may be held liable." *Nietes,* 188 F.Supp. at 220.

Several courts have rejected the *Nietes* court's reasoning and have adhered to the rule that an on-board physician's negligence will not be imputed to the carrier (see, e.g., *Barbetta,* 848 F.2d at 1371; *Amdur,* 310 F.Supp. at 1042; *Di Bonaventure,* 536 F.Supp. at 103-04); nonetheless, other federal and state courts have followed *Nietes.* In *Fairley v. Royal Cruise Line, Ltd.,* 1993 A.M.C. 1633 (S.D.Fla.1993), and *Huntley v. Carnival Corp.,* 307 F.Supp.2d 1372 (S.D.Fla.2004), a federal district court criticized and refused to follow the *Barbetta* rule, opting instead to follow *Nietes.* In *Carlisle,* the Florida appellate court also found "*Nietes* to be the most persuasive precedent," and rejected a motion to dismiss a negligence claim based on vicarious liability against a defendant cruise line. *Carlisle,* 864 So.2d at 5.

Notably, in addition to being criticized and rejected in the cases cited above, the rule barring vicarious liability claims against carriers for their on-board physicians' negligence has similarly been criticized by legal scholars. See, e.g., T. Dickerson, *The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteen-Century Rights,* 28 Tul. Mar. L.J. 447, 452, 495-96 (2004) (criticizing the old line of cases as antiquated and "unfair," and noting that courts and commentators have criticized the rule); B. Herschaft, *Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis,* 17

Nova L.Rev. 575, 592, 594 (1992) (advocating the "well-reasoned decision of *Nietes*" and opining that "[i]t would be in the best interests of the traveling public for admiralty courts to revoke this harsh policy of holding carriers harmless for the torts of physicians engaged by them" and that "the judiciary has sufficient reason to resurrect the *Nietes* opinion * * * so that public policy will be satisfied in admiralty as well as other areas of law"); Note, *Malpractice on the Love Boat: Barbetta v. S/S Bermuda Star,* 14 Tul. Mar. L.J. 381, 391 (1990) (characterizing the *Barbetta* holding as "flawed" and "outmoded"); see also T. Gionis, *Paradox on the High Seas: Evasive Standards of Medical Care-Duty Without Standards of Care; a Call for the International Regulation of Maritime Healthcare Aboard Ships,* 34 J. Marshall L.Rev. 751, 752-53 (2001) (noting the high number of illnesses and injuries occurring at sea).

The above-cited cases and scholarly works identify several compelling reasons to depart from the established rule barring vicarious liability claims. Whether vicarious liability will be imposed generally turns on the ability of the principle to control the acts of his agent and on a variety of other factors, including "whether the work is 'part of the regular business of the employer'; whether the contractor is engaged in a distinct calling; the degree of skill of the contractor, who supplies the locale, tools and instrumentalities; the period of employment and the method of payment." *Fairley,* 1993 A.M.C. at 1635, quoting Restatement (Second) of Agency, § 220(2) (1958). The *Barbetta* court justifies its holding that liability for an on-board doctor's negligence should not be imputed to a cruise line by reasoning that the passenger, rather than the shipowner, controls the relationship between the passenger and the on-board doctor. The *Carlisle* court explained

that the underlying basis for this justification is the statement passengers who fall ill at sea:

> "'may employ the ship's surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves if they are sick, or may go without treatment if they prefer . . . "' *Carlisle,* 864 So.2d at 5, quoting *O'Brien,* 154 Mass. at 276, 28 N.E. at 267.

The *Carlisle* court noted that a cruise line has a general duty to exercise reasonable care. Accordingly, the court referred to the *O'Brien* justification as a "fiction" and noted that "absent from this list is the option of demanding that the captain fulfill the duty of reasonable care 'in some other way,' likely because that concept was no more realistic in 1891 than it is today." *Carlisle,* 864 So.2d at 5. Instead, both the *Carlisle* and the *Huntley* courts found that a passenger does not have control over his relationship with a ship's doctor because "a cruise passenger at sea and in medical distress does not have any meaningful choice but to seek treatment from the ship's doctor." *Carlisle,* 864 So.2d at 5; *Huntley,* 307 F.Supp.2d at 1374; 17 Nova L.Rev. at 588-89; 14 Tul. Mar. L.J. at 389-90. The *Fairley* court also rejected the *Barbetta* court's first justification, finding that a passenger has little control over his relationship with an on-board doctor and stating: "Contrary to the reasoning of *Amdur* and *Barbetta,* [passengers] are not 'free to contract with [an on-board doctor] for any medical services they may require.' [Citations.] If a passenger is ill, and port is distant, the ship's doctor is the passenger's only resort, since evacuation by air rescue is expensive, possible and appropriate only for emergencies. Further, the passenger may be reluctant to seek treatment

from an unknown doctor in a foreign country." *Fairley,* 1993 A.M.C. at 1638-39.

The second justification for the *Barbetta* rule is that shipowners are not in the business of providing medical care. However, it is entirely foreseeable that some cruise passengers at sea will develop medical problems. *Carlisle,* 864 So.2d at 7; 17 Nova L.Rev. at 590; see also 34 J. Marshall L.Rev. 751. Accordingly, "[t]he treatment of cruise passengers by the ship's doctor * * * is not alien to maritime pursuits." *Carlisle,* 864 So.2d at 6; *Huntley,* 307 F.Supp.2d at 1374. The *Nietes* court recognized the "difficulty inherent" in having a nonprofessional employer exercise control over a skilled physician, but reasoned that "the distinction no longer provides a realistic basis for the determination of liability in our modern, highly organized industrial society." *Nietes,* 188 F.Supp. at 220. The court concluded:

> "Surely, the board of directors of a modern steamship company has as little professional ability to supervise effectively the highly skilled operations involved in the navigation of a modern ocean carrier by its master as it has to supervise a physician's treatment of shipboard illness. Yet, the company is held liable for the negligent operation of the ship by its master. So too, should it be liable for the negligent treatment of a passenger by a physician or nurse." *Nietes,* 188 F.Supp. at 220-21.

Moreover, the realities of an on-board physician's relationship with a shipowner indicate that the physician is akin to an employee rather than an independent contractor.

> "'[A physician] is a staff officer aboard ship; and signs the articles as a member of the ship's company. He is subject to the ship's discipline under the general maritime law and is subject to the lawful commands of the master. When sick or injured he is entitled to the remedies of maintenance and cure, the Jones Act, and of a seaworthy ship. Like the steward or radio operator, the ship's doctor is a seaman for purposes of personal injury remedies and for wage relief. The professional standing of a physician is not a valid argument for affording him a special status when a member of the ship's company. He must, in truth, be regarded as on par with fellow officers."' 17 Nova L.Rev. at 585, quoting M. Norris, The Law of Maritime Personal Injuries, § 3:10, at 75 (4th ed.1990).

Furthermore: "According to one local South Florida attorney, doctor contracts vary with each cruise line. For instance, some cruise lines may choose certain doctors for specific cruises. In other cases the doctor may be employed for a fixed period of time such as six months. If these procedures are standard in any way, it would be fatuous for a carrier to insist that it has no capacity to evaluate a doctor's services, because it apparently has already done so by its selective employment practices." 17 Nova L.Rev. at 587.

Additionally, scholars and courts have reasoned that vicarious liability for an on-board physician's negligence should be imposed because cruise lines "reap[ ] the benefits of carrying a doctor aboard [their] vessels." *Fairley,* 1993 A.M.C. at 1639; *Nietes,* 188 F.Supp. at 221; 17 Nova L.Rev. at 590-91. While carriers do not have a duty to supply an on-board doctor, they do owe passengers in need a duty to

provide reasonable medical attention under the circumstances. *Fairley,* 1993 A.M.C. at 1638. "This duty can be discharged by putting into port or summoning air rescue, or by carrying a physician, depending on the seriousness of the malady." *Fairley,* 1993 A.M.C. at 1638. The cruise line benefits because it "avoids many of these costs and inconveniences by the economic expedient of carrying the ship doctor." *Fairley,* 1993 A.M.C. at 1639; *Nietes,* 188 F.Supp. at 221; 17 Nova L.Rev. at 590-91. The cruise line further benefits "by advertising the availability of the ship doctor, since the presence of a qualified physician on board, with a well-equipped and well-staffed infirmary, is an enticement to purchase the ticket." *Fairley,* 1993 A.M.C. at 1639. As one scholar observed:

> "Fierce competition among various cruise lines has led to the publication of elaborate, colorful brochures touting services aboard vessels, some of which specifically mention that they have medical facilities on board. For example, a brochure for Perillo Caribbean Cruises describes the cruise vessel and states: 'Stereo music and telephone in every cabin. Beauty salon, barber, hospital.'" 14 Tul. Mar. L.J. at 389.

Finally, the above-cited cases and articles reason that to impose vicarious liability on a cruise line for the negligent treatment of passengers by its on – board physician is not unreasonable because "the cruise line is already held vicariously liable for the negligence of the same ship's doctor in the treatment of hundreds of people – the crew – under the maritime duty to provide maintenance and cure." *Carlisle,* 864 So.2d at 7, citing *De Zon v. American President Lines,* 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943); 14 Tul. Mar. L.J. at 391.

We agree with the well-reasoned approach of *Nietes, Huntley, Fairley* and *Carlisle.* A passenger on a ship who falls ill has no reasonable choice but to seek treatment from the on-board physician and therefore has little control over their relationship. Furthermore, that an illness would occur at sea should be anticipated, particularly by the cruise industry, and most certainly illnesses do regularly occur at sea. See 34 J. Marshall L.Rev. 751. Accordingly, providing medical treatment for its passengers should be considered a part of a cruise line's business, as evidenced, in part, by federal maritime law's willingness to impose vicarious liability on shipowner's for their on-board physician's negligence in treating crew members. Moreover, cruise lines benefit from carrying on-board physicians.

Furthermore, while we acknowledge that we are bound by federal statute to follow federal maritime law in this matter (see 28 U.S.C. § 1333(1) (2004); *Offshore Logistics, Inc.*, 477 U.S. at 222-23, 106 S.Ct. at 2494, 91 L.Ed.2d at 189-90), *Nietes* and the federal cases that have followed its reasoning and holding indicate that the question of whether a vicarious liability claim against a shipowner for the negligent treatment by its on-board doctor will stand under maritime law is not settled at this time. Accordingly, for the reasons stated above, we elect to follow the holding of the federal courts in *Nietes, Huntley* and *Fairley.*

We therefore affirm the trial court's interlocutory orders denying defendant's motion to dismiss and reinstating plaintiffs' vicarious liability count.

Affirmed.

CAMPBELL, J., concurs. Presiding Justice QUINN, specially concurring.

I concur with the majority's conclusions on both of the issues before us. I agree that the factual findings made by the circuit court as to the paucity of evidence that the Macks received the forum selection clause are not against the manifest weight of the evidence. The evidence presented by both sides would have provided a basis for the circuit court to rule in either party's favor. While it would seem to be extremely easy for the defendant to have retained a copy of the forum clause signed by the plaintiffs, the defendant did not take this precaution. Consequently, I agree with affirming the circuit court's finding on this issue.

As to the issue of whether a vicarious liability claim may be stated by a passenger against a shipowner for alleged negligent treatment by its shipboard doctor, I concur with the majority that, on the facts of this case as presented to us, the circuit court correctly denied defendant's motion to dismiss. It is important to note that in reaching this conclusion, this court acknowledges that we are bound by section 1333(1) of the Judiciary and Judicial Procedure Act to follow federal maritime law in this case. 28 U.S.C. § 1333(1) (2000). See *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 222-23, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174, 190 (1986). Unfortunately, federal maritime law may charitably be described as in a state of flux at this time.

The defendant argues that *De Zon v. American President Lines, Ltd.,* 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943), is dispositive. There, the Supreme Court reviewed the claim of a seaman against his employer based on the

alleged negligence of a shipboard doctor in treating the seaman's injuries. The Supreme Court held that, pursuant to the Jones Act (46 App.U.S.C.A. § 688 (2000)), a shipowner is liable in damages for injuries suffered by a seaman as the result of any negligence on the part of the ship's physician in treating the seaman. In a footnote, the Supreme Court pointed out that "liability to a passenger injured by the negligence of a ship's doctor has been denied" by several lower courts on grounds that the medical service was the doctor and the patient's business and the treatment was not in pursuance of the doctor's duty to the ship or the ship's duty to the passenger. *De Zon v. American President Lines, Ltd.*, 318 U.S. at 666 n. 2, 63 S.Ct. at 818 n. 2, 87 L.Ed. at 1070 n. 2. While the Supreme Court referred to these lower court holdings as being decided by "judges of great learning," the Court's ruminations on this point were clearly *dicta* as the plaintiff before them was employed as a seaman by the shipowner and was therefore protected under the Jones Act.

In the absence of Supreme Court precedent, we are compelled to consider the other federal court decisions which have addressed the issue of vicarious liability of shipowners for the actions of their shipboard doctors. As explained by the majority, in *Nietes v. American President Lines, Ltd.*, 188 F.Supp. 219 (N.D.Cal.1959), *Fairley v. Royal Cruise Line Ltd.*, 1993 A.M.C. 1633 (S.D.Fla.1993), and *Huntley v. Carnival Corp.*, 307 F.Supp.2d 1372 (S.D.Fla.2004), federal district courts held that a shipowner may be held liable for the negligent treatment of a passenger by a shipboard physician employed by the shipowner.

As the majority acknowledge, several federal courts have rejected the reasoning of these cases and have

adhered to the rule that an onboard physician's negligence will not be imputed to the carrier. See *Barbetta v. S/S Bermuda Star,* 848 F.2d 1364, 1369 (5th Cir.1988), *Amdur v. Zim Israel Navigation Co.,* 310 F.Supp. 1033, 1042 (S.D.N.Y.1969); and *DiBonaventure v. Home Lines, Inc.,* 536 F.Supp. 100, 103-04 (E.D.Pa.1982). Also see *Cummiskey v. Chandris, S.A.,* 895 F.2d 107 (2d Cir.1990), 895 F.2d 107, 1990 A.M.C. 1452 (1990) (and cases cited therein).

My concurrence with the majority's holding that the plaintiff's complaint alleging that Royal Caribbean Cruises may be held vicariously liable for the negligence of its shipboard doctor states a claim sufficient to withstand defendant's motion to dismiss is dependent upon the fact that the doctor is an employee of Royal Caribbean Cruises. Defendant has not asserted that the doctor in this case was an independent contractor. While the court in *Fairley v. Royal Cruise Line Ltd.,* 1993 A.M.C. 1633 1639-40, considered whether a theory of apparent agency might apply in cases where the doctor is not an employee of the carrier, thankfully, we do not have to consider this issue.

Finally, I agree with the majority that we should not limit our ruling on the certified questions to merely reviewing the questions themselves; rather, we should also consider the appropriateness of the order giving rise to the appeal. *Billerbeck v. Caterpillar Tractor Co.,* 292 Ill.App.3d 350, 356-57, 226 Ill.Dec. 563, 685 N.E.2d 1018 (1997), *appeal denied,* 176 Ill.2d 570, 229 Ill.Dec. 52, 690 N.E.2d 1379 (1998).

MTM/clb 01-55 #20075

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JAMES MACK and SHEILA MACK, Plaintiffs,	)	
vs.	)	No. 01 L 15372
ROYAL CARIBBEAN CRUISES, LTD., Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed July 12, 2004)

This matter is before this Court on Defendant Royal Caribbean Cruises, Ltd.'s ("RCCL") Motion to Dismiss having been brought pursuant to 735 ILCS 5/2-619(a)(9). Essentially, the Defendant contends that Plaintiffs' case has been brought in the wrong venue, and that Plaintiffs must instead bring their case against RCCL in Miami, Florida. RCCL's motion is premised solely on a forum selection clause which is contained in RCCL's cruise ticket contract which it maintains was provided to and signed by the Plaintiffs. More specifically, Defendant RCCL contends that Paragraphs 11 and 12 of its cruise ticket contract evidence that the Plaintiffs waived any right to file any lawsuit in any forum other than in Miami, Florida. See PX 8.

As this Court concluded that there was a question of fact as to whether Plaintiffs had notice of the forum selection clause, this Court held an evidentiary hearing to

resolve those fact questions on August 29, 2003. During the course of the evidentiary hearing, the Court heard from three (3) witnesses i.e., James Mack, Sheila Mack and Nancy Calvo Varela. The Court also admitted several exhibits into evidence. The following Proposed Findings of Fact and Conclusions of Law are based upon the Court's review of the testimony, the Court's assessment of the witnesses' demeanor and credibility, the Court's review of the exhibits admitted into evidence, as well as the Court's review of the pleadings on file.

FINDINGS OF FACT

1. The Trip

Plaintiffs James and Sheila Mack are husband and wife residing in Illinois who, together with their minor daughter Heather, took a European vacation which included a Mediterranean cruise aboard Royal Caribbean's vessel GRANDEUR OF THE SEAS on August 3, 2001. (First Amended Complaint, ¶ 2; Tr. at 29, 84.). Sheila Mack has a masters degree in business from St. Louis University, and a masters in social work from the University of Chicago. (Tr. at 29-30.) James Mack has a master's degree from Roosevelt University, teaches and composes music. (Tr. at 71.)

In early March 2001, Sheila Mack made inquiries to American Express Travel d/b/a Crossroads Travel Service ("Crossroads Travel"), 171 South Oak Park Avenue, Oak Park, IL 60302 relative to an overseas excursion trip that would involve a sea cruise. The Macks met with Nancy Calvo Varela, their travel agent (and now a manager) for Crossroads Travel in Oakbrook. Illinois, in March, 2001 to discuss Mediterranean and Greek Isle cruise options. (Tr.

at 5, 7.) Varela discussed both Holland America and Royal Caribbean cruises, and gave the Macks brochures from both companies. (Tr. at 8, 31.). Varela was the travel agent who the Macks dealt with exclusively. Shortly after making initial inquiries and on or about March 6, 2001, the Macks agreed to purchase a "Funjet" vacation cruise package trip. The vacation package was to include: round trip air travel from Chicago, Illinois to Rome, Italy; ground transportation from Rome, Italy to Civitavecchia, Italy; cruise ship travel on the "Grandeur of the Seas" which would port at different locations in the Greek Islands; as well hotel accommodations in Rome, Italy following the sea cruise.

2. Payment and Documentation

On or around March 14, 2001 the Macks returned to Crossroads and booked the Royal Caribbean cruise. (Tr. at 8, 31-32.) They placed a deposit and arranged airfare to and from Rome as well as a hotel stay in Rome following the cruise. (Tr. at 9.) The total amount paid on March 14, 2001 was $4,643.00. A Discover credit card was used by Mrs. Mack to pay for the trip. PX 4. Mrs. Mack was given the following documents on March 14, 2001 by Crossroads Travel after making her payment:

a) a Crossroads Travel itinerary which sets forth the dates and times of the air flights, the identity of the ship that the Macks would board in Italy, as well as the identity of the hotel that the Macks would stay in. This itinerary was dated March 14, 2001. (PX 1);

b) a Funjet vacation confirmation slip dated March 14, 2001 (PX 2); and

c) a RCCL passenger confirmation slip dated March 14, 2001 (PX 3).

Neither Mrs. nor Mr. Mack received any RCCL cruise line tickets or RCCL contracts of any kind on March 14, 2001. On or about June 8, 2001, Mrs. Mack was contacted by Crossroads Travel and informed that the final payment for the Mack's trip was due. On or about June 8, 2001 James Mack returned to Crossroads and made the final payment. (Tr. at 10, 34.) Mrs. Mack then made the final payment of $2,547 for the trip. PX 5.

On or about June 28, 2001, Mrs. Mack received a "Funjet Vacations" folder together with airlines tickets for each passenger (James, Sheila and Heather Mack), hotel vouchers, luggage tags, an itinerary and a Funjet brochure. PX 10. Additionally, Mrs. Mack received a final itinerary from Crossroads Travel on June 28, 2001, which set forth the dates and places of travel for the "Funjet" vacation. PX 7. Exhibit 23 is Royal Caribbean's confirmation sheet for the Mack family cruise which indicates the purchase of cancellation insurance. (Tr. at 21-22.) This insurance would have entitled them to a refund if they failed to board the vessel. (Tr. at 22.) Nancy Varela admittedly did not discuss or review the travel documents that she provided to Mrs. Mack with either Mrs. or Mr. Mack. Following the receipt of these documents, Mrs. Mack took control of all the travel documents and secured them until July 27, 2001, which was the intended date of travel and the Mack's departure date from Chicago, Illinois. At no time did Mrs. Mack, or for that matter Mr. Mack, ever dispose of, lose or misplace, any of the documents or materials that had been provided to them by either Crossroads Travel or RCCL.

Nancy Varela testified that she provided an RCCL ticket booklet to Mrs. Mack on June 28, 2001. This RCCL ticket booklet would have included vouchers for ground transportation from the Rome, Italy airport to Civitavecchia, Italy, as well as an RCCL cruise tour ticket contract such as the exemplar of a cruise tour ticket contract which has been identified as PX 8. Based upon the Court's observation and assessment of the witnesses, as well as its review of all of the evidence, the Court specifically finds that neither a RCCL ticket booklet nor a RCCL cruise tour ticket contract such as PX 8 was given to Mrs. Mack on June 28, 2001 or on any other date. None of the travel documents or materials that the Macks were provided with contained any reference to any agreement concerning venue or forum selection. Additionally, Nancy Varela admitted that she, as a matter or procedure, does not inform any of her customers about time or venue limitations and specifically admitted that she did not inform either Sheila or James Mack about time or venue limitations or forum selection clauses.

3. The Mack's Journey

On July 27, 2001, James Mack woke at approximately 4:00 a.m. in order to pack his luggage and to make final preparations for his trip. The Macks arrived at O'Hare airport, Chicago, Illinois at approximately 12:00 p.m. The Macks' initial flight took them to Philadelphia, Pennsylvania and their flight departed O'Hare airport at approximately 2:00 p.m. The initial portion of the flight was 2½ hours. After an hour layover in Philadelphia, Pennsylvania, the Macks boarded a plane that took them to Rome, Italy's international airport. The flight time for this portion of the Macks' trip was about 10 hours. When the

Macks arrived in Rome, Italy, they proceeded through customs and were then were met by a RCCL representative. The RCCL agent directed the Macks to a row of buses that were to transport the Macks from the Rome airport to Civitavecchia, Italy.

When the Macks got to the front of a bus line, they were asked to present their RCCL vouchers for the ground transportation that should have been included within the travel documents that had been provided to the Macks on June 28, 2001. The Macks presented all travel documents that they had received from Crossroads Travel on June 28, 2001 and were informed by a RCCL representative that the Macks did not have the necessary RCCL travel vouchers. As the Mack's names appeared on the RCCL's travel sheets which were in the possession of RCCL's agents, the Macks were allowed to board a bus which then transported them to Civitavecchia, Italy where they intended to board the Grandeur of the Seas. The bus trip took approximately 1½ hours.

When the Mack family arrived alongside the GRANDEUR OF THE SEAS in Civitavecchia, the Tyrrhenian Sea port near Rome, they were directed to take their place in one of several lines that had been alphabetically divided. After waiting for ½ hour, the Macks made it to the front of his designated fine. When James Mack arrived at the front of the line, he was asked to present the RCCL vouchers for the cruise ship that should have been included within the travel documents that had been provided to the Macks on June 28, 2001. Mr. Mack presented all the travel documents that he and his wife had received from Crossroads Travel on June 28, 2001 and were informed by a RCCL representative that the Macks did not have the necessary RCCL travel vouchers that would

allow them to board the cruise ship. As the Macks could not find their cruise ticket booklet, they had to stand in a special line in order to board. (Tr. at 44.) An RCCL representative directed Mr. Mack to another line, which was referred to as a "problem" line. After waiting for a period of time, Mr. Mack made his way to the front of the line.

After again showing an RCCL representative all of the Macks' travel documents, Mr. Mack was informed by the RCCL representative that the Macks did not have the necessary RCCL travel vouchers that would allow them to board the cruise ship. The RCCL representative then presented Mr. Mack with PX 9 and told Mr. Mack that both he and his wife were required to sign the document as a precondition to being allowed to board. When Mr. Mack asked why it was necessary to sign PX 9, he was told by the RCCL representative that neither Mr. Mack nor his family could board the ship without signing it. Exhibit 9 was first signed by James Mack, and then by Sheila Mack. (Tr. at 46, 63-64.) Exhibit 9, titled "Cruise Ticket Contract," states immediately above the passenger signature lines:

> *THIS IS YOUR CRUISE TICKET CONTRACT. IT IS IMPORTANT THAT YOU READ ALL TERMS OF THIS CONTRACT (PP1-2). THIS TICKET IS NOT TRANSFERABLE AND IS NOT SUBJECT TO ALTERATIONS BY THE GUEST.*
>
> */s/* *James L. Mack*
> */s/* *Sheila Von Wiese-Mack*

At the time that Mr. Mack was being asked to sign the document, the Macks had been traveling for over 20 hours. James Mack had not slept during this 20 hour time period

and was tired. Sheila Mack knew she had to sign Exhibit 9 in order to come aboard. (Tr. at 46.) She "assumed" Exhibit 9 had to be signed in order to open up a charge account while aboard. (Tr. at 45.) Sheila Mack does not remember if she or her husband gave Royal Caribbean a credit card, only that one of them did. (Tr. at 68.) James Mack does not recall whether the document he signed in order to board the ship (Exhibit 9) was perforated in the middle or not (Tr. at 83.) James Mack supposes he read the lines (fully capitalized in the exhibit) that stated: "This is your cruise ticket contract. It is important that you read all terms of this contract, pages-1 to 2. This ticket is not transferable and is not subject to alternations by the guest." (Tr. at 90.) James Mack is a musician, he does not read contracts. In his own words, "But who does?" (Tr. at 91.) He "didn't know about the import of it. As far as [he's] concerned, it was no more important than document [his] wife was signing to be able to charge things aboard ship . . . " (Tr. at 86.) Mr. Mack, as well as Mrs. Mack, then signed PX 9.

At no time did any representative or agent of RCCL ever present a complete cruise tour ticket contract, such as PX 8, to either Mr. or Mrs. Mack for their review. At no time did either Mr. or Mrs. Mack ever read the forum selection clauses such as are set forth in Paragraphs 11 and 12 of PX 8. At no time did any representative or agent of RCCL ever advise either Mr. or Mrs. Mack of any forum selection clauses such as are set forth in Paragraphs 11 and 12 of PX 8. Both Mr. and Mrs. Mack were unaware of the existence of any forum selection clause prior to boarding the Grandeur of the Seas or prior to Mr. Mack becoming injured on the Grandeur of the Seas. After signing PX 9, Mr. Mack was not provided with a copy of the document.

After signing PX 9, the Macks were allowed onto the Grandeur of the Seas.

In the Plaintiffs' First Amended Complaint, the Plaintiffs allege, inter alia, that on August 3, 2001, Mr. Mack was injured due to the Defendant's negligent acts and/or omissions. Since the accident, Mr. Mack suffers partial paralysis and attended Court in a wheelchair. RCCL maintains that travel to Miami, Florida for trial would not impose an undue hardship as Mr. Mack has since flown to Cancun, Mexico for an 8-day vacation, to New York, and to Denver. (Tr. at 68-69.) New York and Denver are close to the same distance from Chicago as Chicago is to Miami. Cancun is much farther from Chicago than is Miami.

4. RCCL's Cruise Tour Ticket Contract

RCCL maintains that the clauses which are contained within its tour ticket contract control the venue of this litigation. The relevant portions of the contract are contained within Paragraphs 11 and 12 of PX 8.

> 11. *It is agreed by and between passenger and carrier that all disputes and matters whatsoever arising under, in connection with or incident to this contract shall be litigated, if at all, in and before a court located in Miami, Florida, U.S.A., to the exclusion of the courts of any other state, territory or country. Passenger hereby waives any venue or other objection that he may have to any such action or proceeding being brought in any court located in Miami, Florida.*

12.(A) No suit shall be maintainable against carrier or the vessel upon any claim relating to loss of or damage to property unless written notice of the claim, with full particulars, shall be delivered to carrier at its principal office within ten (10) days after termination of the voyage to which the contract relates; and in no event shall any such suit for any cause against carrier or the vessel relating to loss of or damage to property be maintainable unless such suit shall be commenced (filed) within six (6) months after the termination of the voyage and process served within thirty (30) days after filing, notwithstanding any provision of law or any state or country to the contrary.

(B) No suit shall be maintainable against carrier or the vessel for any claim, including but limited to, delay, detention, personal injury, illness or death of passenger unless written notice of the claim, with full particulars, shall be delivered to carrier at its principal office within six (6) months from the day cause of action occurred; and in no event shall any such suit for any cause against carrier or the vessel be maintainable unless such suit shall be commenced (filed) within one (1) year from the date when the cause of action occurred and process received within thirty (30) days after filing, notwithstanding any provision of law of any state or country to the contrary.

CONCLUSIONS OF LAW

1. A cruise ticket is a maritime contract. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991). Federal admiralty law is to be applied when interpreting and determining the validity of the provisions of a cruise ticket. *Id.*

2. Under federal admiralty law, forum selection clauses are "prima facie valid." *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 589 (1991) (*citing The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 (1972)). They serve an essential purpose, particularly in the cruise line context where passengers hale from all parts of the globe:

> *First, a cruise tine has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. . . . Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. . . . Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.*

Id., 499 U.S. at 593-94 (citations omitted).

3. Neither Sheila nor James Mack ever received a complete Royal Caribbean Cruise Line tour ticket contract such as the one identified as PX 8. The only portion of a Royal Caribbean Cruise Line tour ticket contract that was presented to the Macks was the perforated portion that they signed in Italy and which has been identified as PX 9.

4. At no time was any information, either written or oral, ever communicated to James or Sheila Mack by Royal Caribbean Cruise, Ltd. and/or Crossroads Travel concerning the location as to where any tort claim or lawsuit must be brought to recover damages in the event of injuries caused by the negligence of Royal Caribbean or its agents and/or employees.

5. At no time did either James or Sheila Mack ever accept the terms of any written or oral offer by Royal Caribbean Cruise, Ltd. and/or Crossroads Travel which referred to the required forum or location where any tort claim or lawsuit must be brought to recover damages for injuries caused by the negligent acts by Royal Caribbean and/or its agents and/or employees.

6. The Macks were only presented a portion of the cruise tour ticket contract which has been identified as PX 9. This document does not contain a forum selection clause. The Macks were required to sign PX 9 only when they were ready to board the cruise ship in southern Italy and after having traveled for in excess of 20 hours and when they were tired. If the Macks refused to sign PX 9, they would not have been allowed to board the ship and literally have been left standing at the dock in Italy. The Macks never received a complete cruise tour ticket contract at any time. Consequently, they never read that portion of the cruise tour ticket contract which contained

the forum selection clause. Defendant's forum selection clause or its venue clause was not reasonably communicated to the Plaintiffs, and therefore, cannot be enforced.

7. Enforcing the provisions contained within PX 8 clause would hinder Plaintiffs from having their day in Court because it would require them to travel to Florida. Mr. Mack is presently confined to a wheelchair. Travel is extremely difficult, if not impossible. In addition, Mr. Mack's disabilities will create both physical and financial burdens for him when he reaches Florida for the trial. As genuine physical and financial hardships have been demonstrated, the provisions contained within PX 8 are not enforceable as to James Mack.

8. Sheila and James Mack, as well as their daughter Heather Mack, were citizens and residents of Cook County, Illinois at the time of the purchase of the Funjet Vacation package, at the time of the filing of the lawsuit and up to today's date.

9. The Funjet Vacation package was purchased and paid for in the County of Cook and State of Illinois, and the excursion package was intended to and did begin in Cook County, Illinois. The trip was concluded by a return trip to Cook County, Illinois.

10. All known witnesses to the events set forth within the Plaintiffs' Complaint at Law and which led to the injuries that are complained of are located within Cook County, Illinois, including most of the treating physicians and medical personnel. Any treating physicians who are not located in Cook County, Illinois are located in Italy.

11. No witnesses either to the occurrence, the medical treatment or the damages have been identified as residing in or near Miami, Florida.

12. As a result of being injured on board the Royal Caribbean cruise ship, James Mack has become unable to walk and he is confined to a wheelchair which makes travel to Miami, Florida extremely difficult and something that could be accomplished only with great hardship. For example, he can only use a toilet on an airplane with extreme difficulty,

13. Court congestion is not a significant factor.

14. The citizens of Cook County have an interest in having this case heard in Cook County as the Defendant does business in Cook County and the Plaintiffs are residents of Cook County.

15. There is no evidence that any potential witness would be inconvenienced if this matter remains in Cook County, Illinois.

16. The Defendant has failed to offer any evidence that Cook County is inconvenient to the Defendant.

17. The totality of circumstances of the case, including both public and private factors, do not favor a transfer of this case from Cook County, Illinois to Miami, Florida and the Defendant has failed to meet its burden of proof to establish that Cook County is inconvenient.

18. The testimony of James and Sheila Mack was fully consistent with the evidence before the Court and credible.

IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss is denied.

IT IS FURTHER ORDERED that the Defendant shall file an Answer to the Plaintiff's Complaint at Law within twenty-eight (28) days.

ENTER:

/s/ Joseph Casciato
Hon. Joseph N. Casciato
7/12/04

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

JAMES MACK and SHEILA MACK,	)	
	)	
Plaintiffs and	)	
Respondents-Appellees,	)	
	)	
v.	)	No. 1-04-2168
	)	
ROYAL CARIBBEAN CRUISES, LTD.,	)	
	)	
Defendant and	)	
Petitioner-Appellant.	)	

ORDER

(ORDER Entered Nov. 28, 2005)

This cause coming on to be heard on Defendant/ Petitioner-Appellant's Petition for Rehearing and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Petition for Rehearing is hereby denied.

/s/ Alan J. Greiman
Justice

/s/ Patrick J. Quinn
Justice

/s/ Calvin C. Campbell
Justice

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

March 29, 2006

Mr. Paul J. Kozacky
Kozacky & Weitzel, P.C.
One North LaSalle Street, Suite 3150
Chicago, IL 60602

No. 101775 – James Mack et al., respondents, v. Royal Caribbean Cruises, Ltd., petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 20, 2006.

Cruise Ticket Contract

Booking Number: Y39000B5 Sailing Date: 07 / 28 / 01

Stateroom Number: 2568 Vessel Name: GRANDEUR OF THE SEAS

THIS IS YOUR CRUISE TICKET CONTRACT. IT IS IMPORTANT THAT YOU READ ALL TERMS OF THIS CONTRACT (PP1-2). THIS TICKET IS NOT TRANSFERABLE AND IS NOT SUBJECT TO ALTERATIONS BY THE GUEST.

Guest
1: JAMES L. MACK /s/ James L. Mack
Signature

Guest
2: HEATHER L. MACK /s/ Sheila A. Von Weise Mack
Signature

Guest
3: SHEILA A VON WEISE MACK _____
Signature

Guest
4: _____ _____
Signature

Cruise/Cruise Tour Ticket Contract

Booking Number: _____ Sailing Date: MM / DD / YY

Stateroom Number: _____ Vessel Name: _____

THIS IS YOUR CRUISE/CRUISE TOUR TICKET CONTRACT. IT IS IMPORTANT THAT YOU READ ALL TERMS OF THIS CONTRACT (PP1-2). THIS TICKET IS NOT TRANSFERABLE AND IS NOT SUBJECT TO ALTERATIONS BY THE GUEST.

Guest 1: _____ _____
Signature

Guest 2: _____ _____
Signature

Guest 3: _____ _____
Signature

Guest 4: _____ _____
Signature

Cruise/CruiseTour Ticket Contract
Important – Passenger Cruise/ CruiseTour Ticket Contract 1
Read All Clauses.

Whether or not signed by Passenger, this ticket shall be deemed to be an undertaking and acknowledgement by Passenger that he accepts on behalf of himself and all other persons traveling under this ticket, all the terms and conditions set out herein.

1. (a) "Passenger" includes all persons traveling under this ticket and their heirs and representatives. "Passenger" shall include the plural and the use of the masculine shall include the feminine.

   (b) "Carrier" means the cruise line operator named in Article 20 of this Cruise Ticket Contract, all Vessels, Royal Celebrity Tours Inc. ("RCT") with respect to the RCT Land Tour portion of any CruiseTour, and their respective employees, agents, affiliates, successors and assigns.

(c) "Vessel" means the ship chartered by Carrier on which Passenger may be traveling or against which Passenger may assert a claim.

(d) "CruiseTour shall mean the combined vacation package consisting of the cruise described in this booklet and the RCT Land Tour.

(e) "Rat Land Tour" shall mean the land tour component of a CruiseTour to be provided either prior to the initial embarkation on the cruise or after the final debarkation from the *cruise*, as indicated in this booklet.

(f) "Transport" means the railcars, buses and other modes of transportation or accommodation provided by RCT in connection with a RCT Land Tour.

2. (a) Each adult Passenger is permitted to carry up to two hundred pounds (200 lbs.) of luggage aboard the Vessel. In no event shall any Passenger bring on board the Vessel, or in connection with the RCT Land Tour, any controlled substances, live animals, weapons, firearms, explosives or other similar property without written permission from Carrier. Carrier reserves the right to refuse to permit any Passenger to take on board the Vessel or on any mode of Transport any item Carrier deems inappropriate.

(b) Unless negligent, Carrier is neither responsible nor liable for any loss of or damage to Passenger's property. Liability for loss of or damage to Passenger's property in connection with any air or ground transportation shall be the sole responsibility of the provider of the service and in accordance with applicable limitations.

(c) Carrier's liability for loss or damage to property is limited to $300.00 per Passenger unless Passenger declares the true value in writing and pays Carrier before embarkation or before arriving for the start of the RCT land tour (whichever is earlier) a fee of five percent (5%) of the amount that such value exceeds $300.00. In such event, Carrier's liability shall be limited to its true declared value, but not exceeding $5,000.

(d) In no event shall Carrier be liable for loss of or damage to jewelry, cash, negotiable paper, photographic/electronic equipment or other valuables unless they are deposited with Carrier on the Vessel for safekeeping against receipt (RCT may not accept valuables for deposit). Carrier's liability for loss or damage to valuables so deposited shall not exceed the amounts indicated in Clause 2(c).

3. No undertaking or warranty shall be given or shall be implied as to the seaworthiness, fitness or condition of the Vessel or any food or drink supplied on board.

4. Any medical personnel, masseuse, hair stylist, manicurist or other service providers on board the Vessel or on Transport are provided solely for the convenience of Passenger. Such persons are independent contractors and not acting as agents or representatives of Carrier. Carrier assumes no liability whatsoever for any treatment, diagnosis, advice, examination or other services provided by such persons. Passenger shall pay for all medical care requested or required, whether aboard or ashore, including the cost of any emergency medical care or transportation incurred by Carrier.

5. All arrangements made for or by Passenger for air transportation, shore excursions, ground tours, ground transportation, hotels, restaurants and other similar activities or services are made solely for Passenger's convenience and are at Passenger's risk. The providers of such services are independent contractors and are not acting as agents or representatives of Carrier. In no event shall Carrier be liable for any accident or harm to Passenger which occurs off the Vessel or the Transport as a result of any acts, omissions or negligence of any independent contractors.

6. Carrier may for any reason, at any time and without prior notice, cancel, advance, postpone or deviate from any scheduled sailing or port of call, or substitute another vessel or port of call, and shall not be liable for any loss whatsoever to Passenger by reason of such cancellation, advancement, postponement, substitution or deviation. In connection with a CruiseTour, Carrier may for any reason, at any time and without prior notice, cancel, advance, postpone or deviate from any scheduled departure or destination, or substitute another railcar or bus or destination or lodging or other component of the CruiseTour, and shall not be liable for any loss whatsoever to Passenger by reason of such cancellation, advancement, postponement, substitution or deviation. By way of example, and not limitation, Carrier may deviate from any scheduled sailing and may otherwise land Passenger and his property at any port if Carrier believes that the voyage or any Passenger or property may be adversely affected as a result of hostilities, blockages, prevailing weather conditions, labor conflicts, strikes onboard or ashore, breakdown of Vessel, congestion, docking difficulties or any other cause whatsoever. Similarly, by

way of example, and not limitation, Carrier may at its discretion elect not to visit a location shown on your itinerary. Carrier reserves the right to substitute a hotel for the planned hotel, provided that Carrier shall make commercially reasonable efforts to provide a comparable hotel.

7. Carrier shall have the right to comply with any orders, recommendations, or directions whatsoever given by any governmental entity or by persons purporting to act with such authority and such compliance shall not be deemed a breach of this Contract.

8. Refunds for Passenger cancellations prior to sailing or the first day of the CruiseTour (whichever occurs first) are limited by the terms of Carrier's refund policy. Passengers are advised to consult the Carrier's cruise brochure for the terms of Carrier's refund policy.

9. All Passports, visas and other travel documents required for embarkation and disembarkation and at all ports of call are the responsibility of Passenger.

10. Passenger, or if a minor, his parent or guardian, shall be liable to, and shall reimburse Carrier for, any damage to the Vessel, the Transport or any property of Carrier caused directly or indirectly, in whole or in part, by any willful or negligent act or omission on the part of the Passenger; and Passenger, or if a minor, his parent or guardian, shall further indemnify Carrier, the Vessel and the Transport and each and all of their agents and servants against all liability which Carrier, the Vessel or the Transport or such agents or servants may incur towards any person or company or government for any personal injury,

death or damage to property caused directly or indirectly, in whole or in part, by any willful or negligent act or omission on the part of Passenger.

11. IT IS AGREED BY AND BETWEEN PASSENGER AND CARRIER THAT ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT SHALL BE LITIGATED, IF AT ALL, IN AND BEFORE A COURT LOCATED IN MIAMI, FLORIDA, U.S.A., TO THE EXCLUSION OF THE COURTS OF ANY OTHER STATE, TERRITORY OR COUNTRY. PASSENGER HEREBY WAIVES ANY VENUE OR OTHER OBJECTION THAT HE MAY HAVE TO ANY SUCH ACTION OR PROCEEDING BEING BROUGHT IN ANY COURT LOCATED IN MIAMI, FLORIDA.

12. (A) NO SUIT SHALL BE MAINTAINABLE AGAINST CARRIER, THE VESSEL OR THE TRANSPORT UPON ANY CLAIM RELATING TO LOSS OF OR DAMAGE TO PROPERTY UNLESS WRITTEN NOTICE OF THE CLAIM, WITH FULL PARTICULARS, SHALL BE DELIVERED TO CARRIER AT ITS PRINCIPAL OFFICE WITHIN TEN (10) DAYS AFTER TERMINATION OF THE VOYAGE OR THE CRUISE TOUR (WHICHEVER IS LATER) WHICH THIS CONTRACT RELATES; AND IN NO EVENT SHALL ANY SUCH SUIT FOR ANY CAUSE AGAINST CARRIER, THE VESSEL OR THE TRANSPORT RELATING TO LOSS OF *OR* DAMAGE TO PROPERTY BE MAINTAINABLE UNLESS SUCH SUIT SHALL BE COMMENCED (FILED) WITHIN SIX (6) MONTHS AFTER THE TERMINATION OF THE VOYAGE OR THE CRUISETOUR (WHICHEVER IS LATER)

AND PROCESS SERVED WITHIN THIRTY (30) DAYS AFTER FILING. NOTWITHSTANDING ANY PROVISION OF LAW OF ANY STATE OR COUNTRY TO THE CONTRARY.

(B) NO SUIT SHALL BE MAINTAINABLE AGAINST CARRIER, THE VESSEL OR THE TRANSPORT FOR ANY CLAIM, INCLUDING BUT NOT LIMITED TO, DELAY, DETENTION, PERSONAL INJURY, ILLNESS OR DEATH OF PASSENGER UNLESS WRITTEN NOTICE OF THE CLAIM, WITH FULL PARTICULARS, SHALL BE DELIVERED TO CARRIER AT ITS PRINCIPAL OFFICE WITHIN SIX (6) MONTHS FROM THE DAY CAUSE OF ACTION OCCURRED; AND IN NO EVENT SHALL ANY SUCH SUIT FOR ANY CAUSE AGAINST CARRIER, THE VESSEL OR THE TRANSPORT BE MAINTAINABLE UNLESS SUCH SUIT SHALL BE COMMENCED (FILED) WITHIN ONE (1) YEAR FROM THE DAY WHEN THE CAUSE OF ACTION OCCURRED AND PROCESS SERVED WITHIN THIRTY (30) DAYS AFTER FILING, NOTWITHSTANDING ANY PROVISION OF LAW OF ANY STATE OR COUNTRY TO THE CONTRARY.

(C) THE CARRIER HEREBY DISCLAIMS ALL LIABILITY TO THE PASSENGER FOR DAMAGES FOR EMOTIONAL DISTRESS, MENTAL SUFFERING OR PSYCHOLOGICAL INJURY OF ANY KIND UNDER ANY CIRCUMSTANCES, EXCEPT TO THE EXTENT SUCH DISCLAIMER IS PROHIBITED BY 46 U.S.C. §183C(B). WITHOUT LIMITING THE PRECEDING SENTENCE, IN NO EVENT WILL CARRIER BE LIABLE TO PASSENGER FOR ANY CONSEQUENTIAL, INCIDENTAL, EXEMPLARY OR PUNITIVE DAMAGES.

(D) THE EXCLUSIONS OR LIMITATIONS OF LIABILITY OF CARRIER SET FORTH IN THE PROVISIONS OF THIS CONTRACT SHALL ALSO APPLY TO AND BE FOR THE BENEFIT OF AGENTS, INDEPENDENT CONTRACTORS, CONCESSIONAIRES AND SUPPLIERS OF CARRIER, AS WELL AS OWNERS AND OPERATORS OF ALL SHORESIDE PROPERTIES AT WHICH THE VESSEL OR THE TRANSPORT MAY CALL, AS WELL AS OWNERS, DESIGNERS, INSTALLERS, SUPPLIERS AND MANUFACTURERS OF THE VESSEL OR THE TRANSPORT, OR ANY COMPONENT PARTS OF EITHER, TOGETHER WITH THE EMPLOYEES AND SERVANTS OF EACH OF THE FOREGOING.

13. Passenger, or if a minor, his parent or guardian, shall he liable to carrier, the Vessel and the Transport for any fines or penalties imposed on the Vessel, the Transport or Carrier by any authorities for his failure to observe or comply with local governmental laws or regulations, including requirements relating to immigration, customs or excise.

14. Passenger warrants that he and those traveling with him are fit for travel and that such travel will not endanger themselves or others. Carrier reserves the right to terminate a Passenger's cruise or RCT Land Tour or both at any time, at the risk and expense of the Passenger disembarked, when in the opinion of carrier, Passenger is believed to be a danger to himself or a disturbance or danger to others.

15. Carrier shall not be required to refund any portion of the fire paid by any Passenger who fails for any reason to be onboard the Vessel or the

Transport at the time of the Vessel's or the Transport's departure from the port of embarkation or any port of call or destination or point of departure as the case may be and shall not be responsible for lodging, meals, transportation or other expenses incurred by Passenger as a result thereof. Carrier shall have no obligation to any Passenger to deviate from any scheduled sailing or port of call or destination.

16. Carrier has the exclusive right to include photographic, video and other visual portrayals of Passenger in any pictorial medium of any nature whatsoever for the purpose of trade, advertising, sales, publicity or otherwise, without compensation to Passenger, and all rights, title and interest therein (including all worldwide copyrights therein) shall be Carrier's sole property, free from any claims by Passenger or any person deriving any rights or interest from Passenger.

17. Passenger acknowledges and confirms that any travel agent utilized by Passenger in connection with the issuance of this ticket is, for all purposes, Passenger's agent and Carrier shall not be liable for any representation made by said travel agent Passenger shall at all times remain liable to Carrier for the price of passage.

18. In addition to the restrictions and exemptions from liability provided in this Contract. Carrier shall have the full benefit of any applicable laws providing for limitation and exoneration from liability, and nothing in this Contract is intended to operate to limit or deprive Carrier of any such statutory limitation of or exoneration from liability. Without limiting the foregoing, Carrier claims benefit of all restrictions, exemptions and limitations of the

"Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1974 as well as the Protocol to the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ("Athens Convention"), which limits the liability of the Carrier for the death of or personal injury to a passenger to no more than the applicable amount of Special Drawing Rights as defined therein, and all other limits on damage or loss to personal property.

19. This Contract contains the entire agreement between Carrier and Passenger and supersedes any other agreements, written or oral, relating to the subject matter. Any waiver of any provision of this Contract must be made in writing and signed by Carrier. If any portion of this Contract shall be determined to be invalid, then said pension shall be deemed severed from the Contract in such jurisdiction only and all remaining portions shall remain in full force and effect.

20. Carrier. Royal Caribbean Cruises Ltd., 1050 Caribbean Way, Miami, Florida, and 33132, USA
